No. 710

In The

United States Supreme Court

October Term, 1957

THE SUCHER PACKING CO.,
Petitioner,

vs.

MANUFACTURERS CASUALTY
INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

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No. 716

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INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent has filed as its second brief what it terms a "Reply Brief," not to answer any new matter raised in the Reply Brief previously filed by petitioner, but apparently as additional argument in opposition to the argument originally made in the Petition for Certiorari. This Supplemental Reply Brief of Petitioner is to answer claims in Respondent's "Reply Brief," and is necessary because of the impropriety of respondent's statements.

ARGUMENT

Reference to Alleged Written Confession of Jackson Is Highly Improper

Respondent purportedly quotes from what it claims was a written confession of Jackson. This effort by respondent is highly improper as no such document was ever even so much as identified, much less offered in evidence. If Jackson ever made a written confession, it was never pro-

duced by respondent or anyone else in the court room. Since respondent claims in its "Reply Brief" that it had possession of such a document, if it wished to refer to the same in argument, it surely was its duty to have produced it and offered it in evidence at the trial. Not having done so, it would not be permissible for respondent even to refer to it in this Court, but to go further and purportedly quote from such an alleged document, which is nowhere in the record, is quite improper.

Moreover, such reference by the respondent is also otherwise irrelevant, because the declaration by Jackson to Merica that he had been stealing from petitioner for five years was never claimed to have been in writing. Criminals will often balk at putting in writing what they have said orally, particularly if the same is seriously incriminating.

Reduction of Petitioner's Claim

Surely, petitioner is not subject to criticism for having reduced its claim in filing several amended complaints by eliminating amounts it had earlier included through mistake of its counsel. Nor was it reprehensible for petitioner to have withdrawn claims for loss of beef and veal just before the trial started because of difficulties of proof. For the trial petitioner had reduced its claim to those items and to those amounts it believed it could legally prove. If anything, such reduction and elimination was to petitioner's credit, not discredit.

Consistency of Petitioner's Position

Respondent's rhetorical questions are misleading or without foundation. Once the trial started, petitioner's position was consistent throughout. While petitioner's counsel did revise certain exhibits showing computations, such revisions

were necessary to be consistent, by eliminating items which had been dropped before the trial started. Petitioner at all times steadfastly claimed that the "inventory shortage" records and evidence should go to the jury and that petitioner's claims for loss from unidentified employees, including sausage, were valid, until the trial judge overruled petitioner. The excerpt from petitioner's counsel's argument to the jury quoted by respondent was simply an effort by petitioner to salvage what it could under the judge's ruling with the least damage to itself in the eyes of the jury, or in the words of Judge Learned Hand, "to win a verdict if he could within the narrower borders of the case that the judge had laid down for him."

The isolated excerpt out of context from petitioner's counsel's argument opposing respondent's motion for a directed verdict, only shows counsel's efforts to convince the trial judge that petitioner still had enough of a case to go to the jury even if the judge withdrew the records.

There is not the remotest suggestion in the evidence that petitioner threw away any inventory or product disposition records during the pendency of the case.

The $291.00 referred to by respondent represented only that negligible number of pieces of stolen meat which respondent was willing to admit could still be physically identified in the hands of purchasers from Harris.

Speculation Not Required

Cases cited by respondent that a jury may not be permitted to speculate between several possible causes of loss of equal probability are not applicable here, because here, as has been shown in our earlier briefs, if the petitioner's witnesses were to be believed, and the jury had the sole right to determine their credibility, the only reasonable explanation for the "unexplained loss" was employee dishonesty.

CONCLUSION

It is hoped that the Court will not be misled by the respondent's attempted obfuscation and diversionary tactics. In neither of its briefs has respondent attempted to deny the factual basis for the questions presented in the petitioner's petition or to defend the Court of Appeals' rulings on those questions. Instead respondent has sought to raise other issues as a diversion.

For the reasons stated in the petition, it is earnestly urged that the Petition for a Writ of Certiorari be allowed.

Respectfully submitted,

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